

RMcK
Birmingham, AL

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

E.A. RENFROE & COMPANY, INC.

and

Case 10-CA-171072

KIMANI ADAMS

DECISION, ORDER, AND NOTICE TO SHOW CAUSE

On August 17, 2016, Administrative Law Judge Keltner W. Locke issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

1. The judge found, applying the Board's decisions in *D. R. Horton, Inc.*, 357 NLRB 2277 (2012), enf. denied in relevant part 737 F.3d 344 (5th Cir. 2013), and *Murphy Oil USA, Inc.*, 361 NLRB 774 (2014), enf. denied in relevant part 808 F.3d 1013 (5th Cir. 2015), that the Respondent violated Section 8(a)(1) of the National Labor Relations Act by maintaining the "Mutual Agreement to Arbitrate Employment Related Disputes" (MAA), which requires employees, as a condition of employment, to waive their rights to pursue class or collective actions involving employment-related claims in all forums, whether arbitral or judicial.

Recently, the Supreme Court issued a decision in *Epic Systems Corp. v. Lewis*, 584 U.S. ___, 138 S. Ct. 1612 (2018), a consolidated proceeding including review of court decisions below in *Lewis v. Epic Systems Corp.*, 823 F.3d 1147 (7th Cir. 2016), *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016), and *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015).

Epic Systems concerned the issue, common to all three cases, whether employer-employee agreements that contain class- and collective-action waivers and stipulate that employment disputes are to be resolved by individualized arbitration violate the National Labor Relations Act. *Id.* at ___, 138 S. Ct. at 1619–1621, 1632. The Supreme Court held that such employment agreements do not violate this Act and that the agreements must be enforced as written pursuant to the Federal Arbitration Act. *Id.* at ___, 138 S. Ct. at 1619, 1632.

The Board has considered the decision and the record in light of the exceptions and briefs. In light of the Supreme Court’s decision in *Epic Systems*, which overrules the Board’s holding in *Murphy Oil USA, Inc.*, we conclude that the complaint allegation that the MAA is unlawful based on *Murphy Oil* must be dismissed.¹

2. The judge found that the MAA independently violated Section 8(a)(1) of the Act because it interfered with employees’ ability to access the Board, as set forth in *U-Haul Co. of California*, 347 NLRB 375, 377-378 (2006), *enfd.* 255 Fed. Appx. 527 (D.C. Cir. 2007). In finding the *U-Haul* violation, the judge applied the “reasonably construe” prong of the Board’s decision in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004) (*Lutheran Heritage*). The judge also addressed another alleged unfair labor practice.

Recently, the Board overruled the *Lutheran Heritage* “reasonably construe” test and announced a new standard that applies retroactively to all pending cases. *The Boeing Co.*, 365 NLRB No. 154, slip op. at 14-17 (2017). Accordingly, we sever and retain the *U-Haul* complaint allegation and issue a notice to show cause why it should not be remanded to the judge for further proceedings in light of *Boeing*, including, if necessary, the filing of statements, reopening the record, and issuance of a supplemental decision.

¹ We therefore find no need to address other issues raised by the Respondent’s exceptions regarding this allegation.

ORDER

The complaint allegation that the maintenance of the Mutual Agreement to Arbitrate Employment Related Disputes unlawfully restricts employees' statutory rights to pursue class or collective actions is dismissed.

Further,

NOTICE IS GIVEN that cause be shown in writing, filed with the Board in Washington, D.C., on or before October 18, 2018 (with affidavit of service on the parties to this proceeding), why the complaint allegation that the Respondent's MAA unlawfully restricts employee access to the Board should not be remanded to the administrative law judge for further proceedings consistent with the Board's decision in *Boeing*. Any response should address whether a remand would affect the Board's ability to resolve the remaining complaint allegation that Charging Party Kimani Adams was unlawfully constructively discharged, including whether it should be severed and retained or instead included in the remand. Any briefs or statements in support of the motion shall be filed on the same date.

Dated, Washington, D.C., October 4, 2018.

John F. Ring, Chairman

Lauren McFerran, Member

Marvin E. Kaplan, Member

(SEAL)

NATIONAL LABOR RELATIONS BOARD